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LEGAL ASPECTS OF PRICE CONTROL

By
Edward A. Mag
George J. Feldman

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F O R E W O R D

This manuscript on "Legal Aspects of Price Control" was prepared by Messrs. Edward A. Mag and George J. Feldman. Since it is a convenient summary of the development and present status of the problem, it is made available in mimeographed form.

At the back of this report a brief statement of the studies undertaken by the Division of Review will be found.

L. C. Marshall
Director, Division of Review

February 27, 1936

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LEGAL ASPECTS OF PRICE CONTROL

By
Edward A. Mag & George J. Fieldman.

1. OUTRIGHT PRICE FIXING BY COMPETITORS.

A. HISTORICAL DEVELOPEMENT OF RESTRAINT OF TRADE CONCEPT.

The rules of law governing price fixing and control of prices by competitors developed from the Common Law rules regarding "agreements in restraint of trade" and "monopoly". (*)

"Agreements in restraint of Trade" originally under English Common Law were agreements in which people restricted themselves from following or engaging in a particular occupation. (**) Such agreements were held to be "in restraint of trade", void and enforceable as a matter of public policy, because they deprived the party who assumed the restraint of his means of livelihood, imposed upon the public the risk of his becoming a public charge and deprived it of his services and tended to give a monopoly of the trade to the party obtaining the restraint, and to expose the public to the evils of monopoly. Later industrial conditions changed, people were no longer so dependent on a single occupation, and the idea that "freedom to contract" and protection of "good will" stimulate commerce became generally accepted. In this period, agreements not to engage in an occupation that were ancillary to and executed in consideration of a principal transaction, such as, the sale of one's business and good will, or instruction in a craft or secret process, or the formation of a partnership, were upheld if "reasonable" i.e. reasonable with regard both to the interests of the parties and the public. (***) Only "partial" restraint, those which were limited in time or extent, were deemed "reasonable" by the courts at first but when the scope of business and of opportunities widened further, "general" restraints, unlimited in time or extent were held proper and enforceable if reasonably necessary for the protection of the object of the principal transaction and not unduly prejudicial to the public interest. (****) However, in employer- employee contracts even now only "partial" restraints are

(*) The historical development of the subject in the following paragraphs has been taken from Jones, Historical Development of the Law on Business Competition, 35 Yale Law Journal 905 et seq; Levene and Fieldman "Does Trade Need Anti-Trust Laws (1931)". Watkins Industrial Combinations and Public Policy; Hirsch, Trade Associations; Jaffe & Tobriner, Legality of Price Fixing Agreements, 45 Harvard Law Review, 1164; Addyston Pipe & Steel Co. v. U. S. (1898) 85 Fed. 271; Standard Oil Co. v. U. S. (1911) 221 U. S. 1.

(**) Y. B. 2 H. 5 fol. 5 pl. 26 (1415); Case of Taylors, etc of (1614) 11. Co. 53.

(***) Broad v. Jollyfe (K. B. 1620) Cro. Jac. 596.

(****) Mitchel v. Reynolds (1711) 1 p. W 181; Nordenfeldt V. Maxine Nordenfeldt Co. (1894) A.C.535.

enforcible because the public interest would be prejudiced if a man were able to contract away his entire capacity to earn a living.(*)

The Common Law, concerning "restraint of trade" came to include also agreements among competitors controlling production, or the market, or fixing prices. Here restraint of trade meant not a restriction on the right of the parties to engage in a particular occupation, but a restriction of their freedom in trading and of the freedom in trading of others effected by the agreement. "Restraint of commerce" might have been a more accurate description. Under the heading of "restraint of trade" the courts refused to enforce agreements controlling production, or the market, or fixing prices as a matter of public policy because they suppressed competition and tended toward monopolistic control and the exaction of exorbitant prices. We shall see what consideration has been given to "reasonableness" in the cases.

The early cases in the United States are in great conflict and confusion due perhaps to vague concepts of the meanings of "restraint of trade" and " injury to the public interest" and the application of these concepts under varying circumstances. Some courts condemned price fixing agreements merely because competition between the parties was suppressed. Other courts said such agreements were void per se without regard to whether they were monopolistic in intent or effect. Some courts relied on the fact that freedom of action of the parties was restricted and the fact that monopolistic power was obtained by the parties. A few courts enforced these agreements where the prices fixed were reasonable to the public and proper for the parties on the ground that "partial" restraints were valid if reasonable and not injurious to the public. Some courts said these agreements were enforcible if no monopolistic power was involved. In England, the courts in modern times have upheld price fixing agreements, if reasonable as between the parties, unless it was shown that they would, or were calculated to, produce a real monopoly or enhance prices to an unreasonable extent. In determining whether an agreement will be injurious to public interest, the English courts now consider not only its effect on the interests of the consumers, but on the distributors and on the welfare of the public generally in relation to the interests of the consumers, producers and other directly affected by the agreement. (**)

The term "restraint of trade" also came to be used to describe "monopoly" at Common Law. Monopoly existed by virtue of grants from the Crown of the sole or exclusive control of a trade, business or craft and implied a restraint on the freedom of others to engage in the trade, business or craft, controlled. Monopolies were attended with great evils and injuries to the public were early condemned. In the famous CASE OF MONOPOLIES (1602) the Court found that Royal monopolies (except for newly invented objects included in patents) were not only prejudicial to the traders excluded, but also to the public because their inseparable incidents were (1) raising prices (2) deterioration in quality and (3) impoverishment of the traders excluded. Guild monopolies and foreign trade monopolies were similarly condemned. Adam

(*) Mason v. Provident Clothing Mill and Supply Co.(1913) A.C. 742
(**) Attorney General of the Commonwealth of Australia v. Adelaide Steamship Co., A.C. 781 (1913); cf. Mogul Steamship Co.v. McGregor A.C. 25, (1892)

Smith pointed out that these monopolies excluded other people from the trade, exacted exorbitant prices and were guilty of great waste and frauds. Again individuals frequently obtained control of necessities and other commodities, restrained the natural course of trade and arbitrarily enhanced prices, which were the same consequences as resulted from monopolies. Accordingly laws were passed at various times to prohibit such conduct as forestalling, regrating and engrossing, (*), however, monopolies, as such, created by individuals, were never expressly prohibited at common law. It was felt that "freedom of contract" and "natural" competition would prevent monopolies.

In the United States, following the development of the machine, railroads and large scale production, many business enterprises grew to powerful proportions, indulged in predatory practices and combined and entered into monopolistic contracts between themselves which imposed serious injuries upon the public. Individual states were unable to cope with the situation. After much public agitation and debate Congress in 1890 passed the Sherman Anti Trust Act which not only prohibited but made criminal monopolizing, attempts to monopolize, conspiracies, combinations and agreements in restraint of interstate trade or commerce.(**)

(*) E.G. obstructing the bringing of commodities to market, buying up the supply of necessities, hoarding and refusing to sell except at exclusive prices, etc.

(**) During the debates in Congress it appeared that not only the big "trusts" but also smaller combinations which eliminated competition between themselves and were able to exact arbitrary high prices were to be condemned. See 21 Cong. Rec. 4098

B. DECISION UNDER ANTI-TRUST LEGISLATION

The Trans-Missouri Freight Association case (1897) (*) was the first price fixing agreement to come before the Supreme Court under the Sherman Act. The Court declared illegal an agreement by 18 railroad companies which together had a monopoly of the transportation business in a substantial portion of the United States, and which had formed an association for the purpose of stabilizing rates and stoping rate wars and ruinous competition. It was contended that if the rates fixed were reasonable, the agreement was a reasonable restraint of trade, but the Court held that all agreements which eliminated price competition were condemned by the Sherman Act. A similar ruling was made in the Joint Traffic Association case (1898) (**) where the Court said, speaking also of the Trans-Missouri Freight Association case, that the "actual and direct effect of the two agreements is * * * to maintain rates at a higher level than would otherwise prevail". In these cases the defendants were individually endowed with monopolistic privileges, being railroads, and, by the agreements, they entirely suppressed all competition in their field and actually and arbitrarily increased rates above those prevailing prior to the agreements.

In the Addyston Pipe & Steel case (1899) (***) an association of manufacturers of cast iron pipe and other products formed a marketing arrangement whereby most of the United States east of the Mississippi was divided up among the members who agreed not to compete with each other in bidding upon contracts. The members of the Association dominated and controlled (2/3) of the cast iron pipe production in a large number of states, and, by reason of their geographical proximity to the markets, were able to control prices within the margin of the freight costs to their competitors not so advantageously located. They entered the arrangement for the purpose of increasing and did increase, their prices, although they contended that their purpose was merely to eliminate competition and to fix prices which were fair and reasonable

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(*) United States v. Trans-Missouri Freight Association, 166 U. S. 290 In United States v. Jellico Mountain Coal and Coke Co. (1891) 46 Fed. 432, the first case to arise under the Sherman Act, a lower federal court held that a price fixing scheme was illegal because the parties would not be "governed or controlled by the public markets arising from competition and the operation of the laws of supply and demand."

(**) U. S. v. Joint Traffic Association 171 U. S. 505 (1898)

(***) Addyston Pipe & Steel Co. v. U. S. 175 U. S. 211 (1899)

prices but went further and said that, even if this was not so, reasonableness of the prices was no defense, approving the following language of Judge Taft in the court below:

> "It has been earnestly pres ed upon us that the prices at which cast iron pipe was sold * * * were reasonable * * * We do not think the issue an important one because as already stated, we do not think at common law there is any question of reasonableness open to the court with reference to such contract. Its tendency was certainly the power to charge unreasonable prices had they chosen to do so."*

It should be noted that in this case, the combination was actually and intentionally, or at least potentially, detrimental to the public interest. The members possessed a dominating position in the "market" and had the ability arbitrarily to prescribe the rates to be paid by the public. They made the agreement for the purpose of increasing rates and the effect of it was actually to increase them.

In 1911 the Supreme Court in the Standard Oil case (**) and American Tobacco cases (***) pronounced the so-called "rule of reason" in the construction of the Sherman Act. It was held that the Sherman Act merely embodied the common law on "restraint of trade"; that although monopolizing (restraining trade and bringing about the evil consequences of monopoly) was condemned, monopoly itself was prohibited neither at common law nor under the Sherman Act; and that not all contracts, combinations or conspiracies which restricted competition and obstructed trade, but only such acts, contracts, combinations and conspiracies "Which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade" were condemned. Unification of power and control of the output

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(*) It is significant that the Supreme Court did not go into the question as to whether the elimination of ruinous competition might justify the agreement, but Judge Taft in the lower court opinion made a damaging comment in this regard saying "the Association of the defendants, however reasonable the prices fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill advised competition, was void at common law because in restraint of trade, tending to a monopoly."

(**) Standard Oil Company of New Jersey et al v. U. S. 221 U. S. 1

(***) U. S. v. American Tobacco Company 221 U. S. 106

of an industry gave rise to a prima facie presumption of an intention to monopolize and restrain trade but it was for the court to determine from the evidence before it whether the purpose, conduct or effect of the particular organization or combination was actually to unreasonably restrain trade and to bring about the evil consequences of monopoly. (*)

This construction of the Sherman Act may have been contrary to the intent of Congress and at any rate made the Act vague in its application and permitted an increase in powerful industrial units and "close knit" combinations in the past two decades. In 1918 the Supreme Court refused to dissolve the United Shoe Machinery Company, a combination, formed in 1899, of seven shoe machinery companies which together controlled by patents the major portion of the output of various types of machinery used in the process of shoe manufacturing.**

Again the U. S. Steel Corporation, an integrated combine in the form of a holding company, which had acquired a controlling interest in former competitive units and thereby obtained control of at least 50% of the total output of the industry and an even larger percentage of the output of certain branches, was held by a 4 to 3 decision not to constitute an unreasonable restraint of trade. (***) Likewise the International Harvester Company was held not to have effected an unreasonable restraint of trade even though its control of the output of the industry was greater than that of the Steel Corporation and it was shown to be a dominant factor in setting market prices which were voluntarily followed by its competitors. (****) The Court found that these organizations were formed for the purpose of effecting economies and efficiencies in production and in the course of what seemed to be the Court normal growth and integration; that they were not guilty (at least at the time of the prosecution) of predatory competitive

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(*) In the two cases under consideration when the "rule of reason" was announced, the Supreme Court held that the defendants had actually unduly restrained trade and ordered the combinations to be dissolved.

(**) United States v. United Shoe Machinery Company, (1918) 247 U. S. 32 "tying leases", which purchasers from the combination were compelled to assume, were held not unduly to restrain trade. In a later case, however, under the Clayton Act these leases were enjoined. See United Shoe Machinery Corporation v. U. S. (1922) 258 U. S. 45.

(***) U. S. v. U. S. Steel Corporation (1920) 251 U. S. 417

(****) U. S. v. International Harvester Co. (1927) 274 U. S. 693

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practices; that they were not formed for the purpose of obtaining monopoly control and did not exercise it; and that if they did suppress competition between, and fix prices for, their component parts, this was incidental and not unreasonable, because they still had to meet substantial outside competition. The Court held that mere size or dominant position or unexerted power without proof of predatory or other monopolistic tactics toward competitors, was not sufficient to show illegality under the Act. (*)

Outright agreements, combinations or other schemes for controlling production or prices by a substantial number of competitors, who have no effective competition to meet in the market, whether accomplished by formal agreement or tacit understanding (**) or under the guise of price filing (future transactions) (***) or other schemes which amount in fact to price fixing or production control are clearly in violation of theSherman Act.

The evils of such agreements have been aptly expressed by the Supreme Court in speaking of the evils of running a corner in the cotton market: "It operates to thwart the usual operation of the law of supply and demand, to withdraw the commodity from the normal flow of trade, to enhance prices, and to hamper users and consumers in satisfying their needs". (****)

The Trenton Potteries case (1927) (*****) involved the legality of a combination, by those controlling 82% of the business of manufacturing and distributing vitreous pottery throughout the United States, to fix

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(*) These decisions have been severely criticized because competition between the component parts of the combines was eliminated, and because size and dominant position actually lessen the competitive impulses of outside competitors and enable the "big fellow" to impose and maintain in the whole industry artificial charges, of which the basing point system in the steel industry is cited as an outstanding example. (See Fetter, Masquerade of Monopoly.

(**) F. T. C. v. Pacific States Paper Trade Association, 273 U. S. 52 (1927)

(***) U. S. v. American Linseed Oil Company (1923) 262 U. S. 371
American Column & Lumber Co. v. U. S. (1921) 257 U. S. 377

(****) U. S. v. Patten, (1913) 226 U. S. 525

(*****) U. S. v. Trenton Potteries Co. 273 U. S. 392

prices and to sell only to jobbers. The defendants were convicted on an indictment for violation of the Sherman Act. There was no evidence that the prices fixed were unfair or exorbitant. (At times they were even below the cost of production - see defendants' brief.) The trial judge charged the jury that as a matter of law if the parties controlled a substantial part of the industry and entered into an agreement fixing prices it was an unreasonable restraint of trade and a violation of the Act without regard to the reasonableness of the prices fixed or whether they were actually lowered or raised. The defendants appealed on the ground that there was an error in the charge. They contended that the question of reasonableness should have been left to the jury because price fixing agreements by those controlling a substantial part of an industry are not illegal per se but only if actually injurious to the public. The Supreme Court upheld the convictions, Justice Stone writing the opinion from which the following language has been extracted, thus and Justices dissenting.

> "That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the Standard Oil and Tobacco cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it can not be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interests is best protected from the evils of monopoly and price control by the maintenance of competition....
>
> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixing today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful

> restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the Government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legialation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable--a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

It should be noted the the jury might well have held that the agreement, in view of the large portion of the industry controlled by the parties and the power arbitrarily to fix and establish exorbitant or unfair prices, was unreasonable, even though the prices actually fixed were reasonable, but this is quite different from holding, as a matter of law, that the agreement was per se illegal, and hence necessarily prejudicial to the public interest. (*)

On the other hand, agreements or combinations of competitors which the court finds from the facts before it, regulate and promote competition rather than suppress or destroy it, are held not unreasonable restraints of trade.

The leading case on this point is Chicago Board of Trade v. U. S. (1918) (**) That case involved an agreement by members of the Chicago Board of Trade to maintain between the close of exchange on one day and the opening on the next the price which had been that day determined on the floor of the exchange: The Court held that the agreement had no

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(*) The Supreme Court has indicated in subsequent decisions (Appalachian Coals, Inc. v. U. S. (1933) 288 U. S. 344 and Farmers' Guide Publishing Company v. Prairie Co. (1934) 293 U. S. 268, that a price fixing agreement is illegal per se only where, as in the Trenton Potteries case, the parties to the agreement control the market and have the power to establish the prices they fix in U. S. v. Live Poultry Dealers Association (1934) 298 Fed. 129 a combination of 50% of the buyers was held to be numerous enough to control the market, and in American Column & Lumber Company v. U. S. (1921) 257 U. S. 377 a combination representing 33 1/3% of an industry was condemned. On the other hand in Standard Oil Company v. U. S. (1931) 283 U. S. 163, and in the Appalachian Coals, Inc., case,the court held that a combination controlling 26 % of the total production of gasoline and 11.9% of the total production of bituminous coal, respectively, could not effectively control the supply or fix prices in the market.

(**) 246 U. S. 231

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appreciable affect on general market prices or on the volume of trade, and that, on the contrary, it helped to improve market conditions. The Court said:

> "The case was rested on the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." (p.238)

Again, where the Court is of the opinion, on the basis of the evidence, that there has been no agreement to fix or control prices, it has approved such regulation of competition as gathering and fair dissemination of statistics and other information, open price filing and the elimination of illegal and wasteful practices (*) thus recognizing the changing nature and increasing complexity of the business structure and competition, plus the desirability of proper regulation in the public interest.

The Appalachian Coals case is illustrative. This case involved a combination of 137 coal producers and an exclusive selling agency created by them. The selling agency was given the exclusive right and agreed to sell all coal produced by the members at the best price it could obtain and if it could not sell all coal produced, it was to prorate to the members whatever sales it made. The defendants produced 54% of all bituminous coal mined in the Appalachian Coal region (64% if the coal in "captive" mines was excluded), but only 11.9% of all

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(*) Maple Flooring Mfg. Assoc. v. U. S. (1925) 268 U. S. 563
Cement Manufacturers Protective Assoc. v. U. S. (1925) 268 U. S. 588
Appalachian Coals, Inc. v. U. S. supra.

coal mined East of the Mississippi River which was in competition with the Appalachian region in or directly at its markets. No limitation was placed upon the volume of coal that any party to the agreement could produce. The Government [illegible] restrain the execution of the plan before it went into [illegible] on the grounds that the plan eliminated competition among the defendants, gave the sales agency the power to fix the price of their coal and to fix or affect the price of all coal in the markets concerned, and that the evils existing in the industry could have been eliminated without giving the sales agency this power. The lower Court sustained the Government's contention that the plan violated the Sherman Act, having found the following facts and drawn the following conclusions:

1. The economic condition of the coal industry was deplorable. Practically every mine showed a deficit almost every year. There were many bankruptcies, receiverships and shut-downs; operations were curtailed, wages were cut and taxes were unpaid. (The record showed that prices were down to as low as 40¢ per ton at the mine.)

2. There was a great degree of overproduction; production demand for coal had fallen off sharply due to the introduction of competitive fuels and other causes.

3. Destructive and evil practices existed in the industry, such as (a) "distress" coal, (b) "gyrounding", (c) misrepresentations of size and quality, (d) lack of standardization, (e) credit losses and (f) domination of the market and forcing down of prices by large buyers.

4. There would still remain substantial competition in practically all markets in which Appalachian coal was sold even with the plan in operation, either from coal producers in the Appalachian territory who were not members or from outside producers and from other fuels and available undeveloped mines.

5. The selling agency would not have monopoly control of any market nor the power to fix market prices, but the elimination of competition between the members and concerted action in their sales would have a tendency to raise general market prices.

The defendants contended that the agreement was not one to fix prices or control production because the selling agency had to sell at the best prices obtainable in the market; that they controlled only a small portion of the coal sold in most of the markets and were subject in all markets to strong competition from other fuels and to the potential competition of other mines; that they did not limit the production of any member; and that they could neither arbitrarily fix nor affect prices of coal in the markets.(*) The defendants further contended that the main purposes of the plan were the elimination of ruinous and wasteful practices in the industry and that this would

(*) In a few Southern states located near the Appalachian region, it was shown that the defendants sold most of the coal consumed, but it was claimed that the potential competition from other producers and other fuels eliminated the possibility of exacting arbitrary prices there.

rebound to the interest of consumers, competitors and the public, as well as to the parties; that any restraint on competition involved was merely incidental and not unreasonable; that the plan of an exclusive selling agency was a usual and normal method of selling; and that there should be no distinction in the law governing a combination of independent competitors to sell their combined output through a single agency at uniform prices from the law governing the outright merger of competitors into a single corporation which would as effectively eliminate the competition between the members, and in a like manner indirectly affect market prices by reducing the number of competitors, so long as the intent and effect of the combination was neither to monopolize the business nor to increase prices.

In a supplementary brief filed by Walker D. Hines, et als, as amici curiae on behalf of the Cotton Textile Institute and other trade associations, it was claimed that the fundamental objective of the anti-trust laws was the maintenance of an effectively functioning competitive system; that only those combinations which unduly impede the effective functioning of the competitive system are illegal; that in determining whether it was unduly impeded, the Court should consider the existing conditions and the functioning of the competitive system in the particular industry involved; that the effective functioning of the competitive system breaks down if active competition is absent on either the buyer's or seller's side, whether due to concerted action or extrinsic conditions such as acute shortage or great over-capacity; and that concerted effort among competitors to prevent or mitigate the effect of a breakdown in the functioning of the system due to extrinsic causes is not illegal if the total effect is reasonable.

The brief pointed out that in an industry confronted with an increasing use of substitutes, or more economical methods in the use of its products, permanent over-capacity may occur, and since capital and labor back mobility an unnatural "panic" market may result and break down the effective functioning of the competitive system.

Accordingly it was argued th t it was in the public interest to permit concerted action by the members of the industry to relieve the evils resulting from artificial depressants in an unnatural market and to assure a more natural functioning of the market. The brief distinguished between fixing prices in the sense of naming them and arbitrarly establishing prices through economic power over the market.

The Supreme Court upheld the contentions of the defendants and reversed the lower court. The plan not yet having been put into operation, there was no proof that it would actually increase prices or unduly suppress competition. The Court held that the plan did not involve the fixing of market prices; that the mere elimination of competition between the parties was not enough to condemn it; and that in view of the deplorable conditions in the industry, the abuses in competitive dealings, the relatively small portion of the total production of bituminous coal which was included under the plan, and the existence of "exceptional competitive opportunities" in the industry making the establishment by the defendants of arbitrary and unreasonable prices presumably impossible, the plan did not constitute an unreasonable restraint.

The Court noted that consumers and competitors of the defendants testified in favor of the plan, and that although the Government criticized the connection of these witnesses with the defendants, it had produced no testimony to show that the plan would be unfair to anyone. The following extracts from the opinion are significant:

"It is necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of the defendants' plan of making sales, the reasons which led to its adoption and the probable consequences of carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal".

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"The more serious question relates to the effect of the plan on competition between defendants and other producers *** (the evidence) fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions.

***

"The bituminous coal industry under normal conditions affords most exceptional competitive opportunities.

***

"The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed***The interests of producers and consumers are interlinked. When industry is grievously harmed, when producing concerns fail, when unemployment mounts and communities dependent upon profitable produce are prostrated, the wells of commerce go dry.

***

"* * * A cooperative enterprise, otherwise free from objections, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through illegal processes. The fact that the correction of abuses may tend to stabilize a business or to produce fairer price levels, does not mean that the abuses should go unprotected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."

"Putting an end to injurious practices and the consequent improvement of the competitive position of a group of producers is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of price."

The Court however, ordered the lower Court to retain jurisdiction

of the case so that if after the plan had been put into operation subsequent events would show that it was used to the "impairment of fair competitive opportunities," the Court could proceed with the injunction. The case is significant in that the Court recognized that the interests of producers and consumers are interlinked, that if producers fail because of competitive evils and employees are idle the "wells of commerce go dry", and that it may be in the public interest to permit cooperative action of competitors to eliminate abuses and mitigate evils even though it restrains trade to some extent. (*) However, the legal report of the decision must be limited to the situation disclosed, because conditions in the industry were particularly distressing and of great concern to the general public, and there were "effective competitive opportunities" outside the combination. (**) Viewed in the light of the facts the decision seems to take very little from the rule laid down in the Trenton Potteries case.

The Sugar Institute case (***) primarily involved Trade Association activities with reference to open price filing, gathering and disseminating statistics, controlling channels of trade, boycotting, uniform discounts, charges and terms, exchange of credit information and other trade practices without any outright agreement to fix prices. The defendants claimed that their activities were directed toward the elimination of evils, abuses and wasteful practices in the industry

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(*) In Home Building & Loan Association v. Blaisdell (Minn. Moratorium case.) (1933) 290 U. S. 398 the Supreme Court took judicial notice of the effect of the economic condition of individual entrepreneurs on the welfare of the State.

(**) In Farmers' Guide Publishing Company v. Prairie Co. (1934) 293 U. S. 268, the Supreme Court distinguished the Appalachian Coals case on the ground that such small percentage of the industry was included in the combination and that the defendants had to meet such strong competition outside. In N. Y. Clothing Manufacturers' Exchange v. Textile Finishers Association, 238 N. Y. App. Div. 444, it was held on the authority of the Appalachian Coals, Inc., case that an association of clothing finishers, doing approximately 90% of the business in New York City, which fixed minimum prices, based as "actual" costs, in an effort to prevent competitive conditions from forcing its members to operate at a loss and cut wages, and to eliminate other abuses in the industry, was not in restraint of trade at common law nor under the state anti-trust statute. The court found that the danger of monopoly was limited here because the capital investment necessary to engage in the business was small. But see Note 33 Columbia Law Review 1450 pointing out that this case is contrary to the prevailing law and Endicott v. Rosenthal 216 Calif. 721, 16 Pac. 2nd. 67 (1932). It has been suggested that wherever the conditions for the effective operation of competition are absent, agreements fixing reasonable prices should be permitted even though the parties include a major portion of the industry. Jaffe & Tobriner, Legality of Price Fixing Agreements, 45 Harvard Law Review 1164.

(***)U. S. v. Sugar Institute, Inc. et al (1935) U.S.D.C. So. D. N.Y.

and for the purpose of regulating and more intelligently conducting competition. The lower Court found that the regulations and activities of the defendants were beyond what was necessary or proper in the mitigation of the abuses and evils and were intended and directed to maintain uniformity in price structure and high price levels.

Many of the activities of the defendants were clearly in the interest of the refiners alone and enabled them to obtain unfair advantages or to impose harsh restrictions on consumers or others in the channels of the trade. (*) The most objectionable part of the plan was the open price filing system which included an agreement not to make any price changes without public announcement. This, when taken together with the prohibitions of various concessions, the court concluded, greatly reduced the impulse of competitors to lower prices and enabled the industry to maintain higher price levels than might otherwise have prevailed. The defendants tried to justify their activities by showing that prices were not increased or consistently maintained and that profits were not unreasonable. The evidence indicated, however, that prices of refined sugar did not drop or vary as frequently as prices of raw sugar which constituted a very large element of cost, and that, consequently, margins of the producers were increased. The Court held that in effect it was immaterial whether or not the defendants obtained undue profits by their plan so long as they controlled the market and unduly suppressed competition. (**)

It is well for the purpose of this discussion, to make the following observations on the facts in the Sugar Institute case:

1. The defendants refined practically all of the imported sugar processed in the United States; had very little competition from any other sources, actual or potential, and almost completely dominated and controlled the entire market. (Such facts should particularly call for "vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce" and impel a court to "carefully scrutinize the activities of the defendants".)

2. The evidence did not disclose that conditions in the industry were so distressing, or the competitive situation so bad or prices so low that the life of the industry was threatened or had become a matter

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(*) While under different circumstances some of the defendants' activities might have constituted legitimate and reasonable regulations for the promotion of competition, such as controlling the dumping of damaged sugar to prevent depressing the market unduly, yet, when all the activities were taken together, the conclusions of the lower court would seem to have been correct.

(**) A detailed abstract of the facts and conclusions of the court in this case has been prepared by the writer.

of public concern as in the Appalachian Coals case.

3. The defendants attempted to eliminate many competitive practices which might have been detrimental and wasteful when their own interests alone were considered but were not shown to have been necessarily uneconomic when all interests affected were considered. Furthermore, the defendants, in the opinion of the Court, went beyond what was reasonable or necessary in order to accomplish the alleged purposes of their activities.

4. Although there was no outright agreement to fix prices it seems that the intent and effect of the agreement among the competitors was to suppress competition and maintain price levels.

II. GOVERNMENTAL REGULATION OF PRICES

Governmental regulation of prices is by no means a new idea. It constituted an important element in the economic life of the Ancient and Middle Ages. Parliament in early times frequently fixed the prices to be charged in the public markets for necessities. Colonial Legislatures resorted to regulation of prices. Congress regulated prices of necessities during the War under the Lever Act. (*) The United States Constitution, however. greatly limits government regulation of prices or production. The Fifth and Fourteenth Amendments provide in effect that a person cannot be deprived by legislation of his property or freedom to contract without due process of law. But these guarantees (*) do not apply to legislation, properly within the scope of the so-called "police power" of a state or the powers delegated to Congress by the Federal Constitution (*) Outright fixing of prices or wages, or regulating of production has been generally disapproved by the Supreme Court as violative of the due process clause except in connection with "businesses affected with a public interest", a concept which originated with Lord Hale and was adopted by the Supreme Court in Munn v.Illinois(*). In classifying what businesses are so affected with a public interest as to permit price fixing the Supreme Court had much difficulty. In the Wolff Packing Company case (1922) (*) Mr. Justice Taft, writing the opinion for the Supreme Court said that "businesses. affected with a public interest" include (1) businesses which are carried on under the authority of a public grant of privileges like railroads and public utilities, (2) certain exceptional occupations, which have been subjected historically to regulation, such as innkeepers, and owners of cabs and grist mills and (3) businesses which, though not public at their inception, have come to hold such a peculiar relation to the public that they are said to have been devoted to the public use and to have become subject to some degree of governmental regulation. In nearly all the businesses included under the third head, said Justice Taft, "the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected." Again, "the circumstances which clothe a particular kind of

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(*). 41 Stat. 297, (1919).

(*) 99 U. S. 113 (1877)

(*) This is not correct. See discussion of degree of reasonableness in Wilson v New, 243 U.S. 342 (K)

(*) Wolff Packing Co. v. Court of Industrial Relations 262 U.S. 522

business with public interest" must be "such as to create a peculiarly close relation between the public and those engaged in it, and raise an implication of an affirmative obligation on their part to be reasonable with the public". But, said he, "it has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator or the miner, was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation". He further pointed out that even though a business is found to be affected with a public interest, the extent and nature of the governmental regulation to which it can properly be subjected may be limited, and will vary according to particular conditions, the nature of the business, the feature which touches the public and the abuses reasonable to be feared.

The case involved the constitutionality of an act passed by the State of Kansas declaring the preparation and manufacturing of food and clothing and the production of fuel to be affected with a public interest and establishing a Court of Industrial Relations to fix wages of employees who were in dispute with their employers in these industries.

The Court held that whether a business declared by the legislature to be affected with a public interest was actually so affected could be determined by the Court, but it refused to determine in this case whether the preparation of food, the particular situation before it, was actually affected with a public interest, because it held that even if it were, it could not be subjected to legislation fixing wages to be paid to employees under the circumstances and conditions which surrounded this business in the State of Kansas when the statute was passed.

Prior to the Wolff case the Supreme Court had held in Germania Alliance Insurance Co. v. Kansas, (1914) (*) that the insurance business is so affected with a public interest as to make legislation regulating the rates charged constitutional. basing its holding on the peculiar nature of the insurance business, its necessity to the public and its need for regulation. Also in Block v. Hirsch (1920) (*) it upheld the District of Columbia Emergency Rent Law under which a commission was established with power to adjust rentals during a housing emergency which followed the war. The Court held here that "all the elements of the public interest justifying some degree of public control are present," noting that housing was a necessity of life and, under the conditions of the emergency, monopolized in a few hands. Subsequent decisions of the court treated these two cases as exceptional situations.

In Tyson v. Banton (1927) (*) the Supreme Court by five to four

(*) 233 U. S. 389

(*) 256 U. S. [illegible]

(*) 273 U.S. 418. In the dissenting opinion in this case the language of Mr. Justice Stone is instructive, to-wit: "It may be assumed that as a general proposition under the decisions of this Court the power of state governments to regulate and control prices may be invoked only in special and in well defined circumstances. * *

"Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this court in which price regulation has been upheld

Footnote continued on following page.

decision disclosing a wide difference of opinion over the meaning of "business affected with a public interest" reiterated the rule that the sale of ordinary commodities is not so affected with such public interest as to justify legislative price fixing and held a statute fixing the maximum charges to be made by theatre ticket agents unconstitutional. (*) Again, in the Ribnik case (**) by a six to three decision, the Supreme Court held that the business of employment agencies, although infected with evils and abuses, was not so affected with a public interest as to permit legislation fixing the charges that could be made. And in the Williams case (1928) (*) the Supreme Court held that the business of dealing in gasoline was not affected with a public interest and that regulation of prices by a legislature was in violation of the due process clause.

On the other hand the court upheld the Grain Futures Act and the Packing and Stockyards Acts as proper legislation regulative of private

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(***)Cont'd.
will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious consequences result to a very large number of members of the community."

(*) But it should be urged that the Court emphasize the point that the N.Y. statute was not confined to theatres, but covered all amusements, exhibitions, etc., to which an admission charge was made to the public college football games which fall within that category.

(**)Ribnik v. McBride, 277 U.S.350. The language of the dissenting opinion of Mr. Justice Stone in this case is again instructive, to-wit:
"The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the 'public interest' exists. ** The economic disadvantages of a class and the attempt to ameliorate its condition may be sufficient to give rise to the 'public interest' and to justify the regulation of contracts with its members *** and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other times or in other places would be matters purely of private concern."

(***) William v. Standard Oil Co. 278 U. S. 235.

business which affected the public interest. (*)

In Liebman v. New State Ice Co. (1931) (**) the Supreme Court by a six-to-two decision held that the ice business in the State of Oklahoma, the declaration of the legislature to the contrary notwithstanding, was was not so affected with a public interest as to enable the legislature to forbid a person to enter into the business without first obtaining a license and certificate of public necessity and convenience. Mr. Justice Sutherland writing the opinion of the Court said that the ice business was not "a paramount industry upon which the prosperity of the entire state in large measure depends." He distinguished the ice business from the business of operating a cotton gin, which had previously been held by the court to be a business which could be subjected to this type of regulation. He emphasized the fact that since cotton growers constituted a large part of the population of the state and were dependent on the cotton gins and at the mercy of the operators of the gins in respect to their charges, the business of operating gins was of paramount and vital importance to the welfare and prosperity of the state. Mr. Justice Brandeis wrote a memorable dissent in which he pointed out the nature, condition and experience of the ice business in Oklahoma, its necessity to the people, and the existence of destructive and ruinous competition in it. He argued that these facts indicated that the ice business was a matter of proper concern to the public and therefore subject to regulation by the Legislature, After re-examining the decisions upon which the doctrine of "business affected with a public interest" was based, he pronounced a new test for the determination of the constitutionality of governmental regulation of private business, - "public concern". His opinion was in part as follows:

> "The business of supplying to others, for compensation, any article or service whatsoever, may become a matter of public concern. Whether it is, or is not, depends upon the conditions existing in the community. If it is a matter of public concern, it may be regulated whatever the business. The public's concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation ***. On the other hand, the public's concern about a particular business may be so pervasive and varied as to require constant detailed supervision in a very high degree of regulation ***. It is of such businesses that the designation 'public utilities' is commonly applied; or they are spoken of as 'Affected with a public interest'***.
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> "The limitation is that set by the due process clause which *** requires that regulation shall be not unreasonable, arbitrary or capricious; and that the means of regulation shall have a real substantial relation to the object to be obtained."

(*) Chicago Board of Trade v. Olsen 262 U. S. 1 (1923)
Stafford v Wallace 258 U. S. 495 (1922)
Tagg Bros. & Morehead v U. S. 280 U. S. 420 (1930)

(**) 285 U. S. 262

Mr. Justice Brandies also pointed out that the power to legislate in the promotion of the public welfare includes not merely prevention of monopolies but also, if found to be in the public interest, actual promotion of monopolies subject to effective public control. He took judicial notice of the depression, production and the evils of the competitive system which had hitherto been so jealously protected by the state, and asserted that it was the privilege of the state to experiment with new economic theories and to adopt measures for the control of production and the regulation of competition.

The ideas expressed in the dissenting opinions of Mr. Justice Brandeis in the Liebman case and of Mr. Justice Stone in the Tyson and Ribnik cases were largely incorporated in the majority opinion in Nebbia v New York (1934) (*). In this case a New York statute fixing minimum and maximum prices in the sale of fliud milk was held to be constitutional in view of the economic situation of the producers, the abuses in the business, and the dependence of the public health on the condition of the business. The case is extremely important because it lays down a new conception of public interest in business and opens the door to legislative control and regulation of prices and production in those industries in which the legislature can reasonable find from the surrounding economic facts and conditions that the public welfare requires the regulation, provided the statute is not arbitrary, capricious or discriminatory. The following are pertinent extracts from the opinion of the Court, written by Justice Roberts:

> "It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court 262 U. S. 522, 535. The phase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.
>
> "But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonable be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are

(*) 291 U. S. 502

neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such a fashion as to inflict injury upon the public at large, or upon any substantial group of the people." Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory of irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

It is not proper to conclude from the Nebbia case that a legislature may now at any time regulate the selling price of any and all commodities. It still must appear (1) that the occasion is proper and (2) that the measures are appropriate. The particular situation and conditions existing and the measures adopted must still be considered in determining whether governmental price fixing will be constitutional under particular circumstances.(*)

(*) In the recent case of Doubleday Doran, Inc. et al v R. H. Macy, et al decided by the New York Court of Appeals, January 7, 1936, the New York Fair Trade Act under which sales of a branded article at less than the price fixed by the producer were forbidden was held unconstitutional as applied to the sale of books because the book business is not "affected with a public interest"; there was no emergency in the industry and the business of selling books was not such as came within the classes which must submit to rate fixing.

In the case of price fixing by Congress, of course, it must appear that the legislation bears a reasonable relation to the exertion of a power granted to Congress by the Constitution. (*)

Even where government power to regulate prices does exist, the matter of whether the prices fixed are arbitrary, capricious or discriminatory may still be brought into question and the decision will involve a consideration of the complex and complicated economic factors and relationships which are bound to be affected.(*) The legality under the "due process clause" of the prices fixed depends in each case on the particular circumstances involved.

The N.I.R.A. did not specifically authorize price fixing, and price fixing under the codes was therefore of doubtful validity, although it was indulged in by the N.R.A. in a few instances on the assumption that it was within one or more of the general policies of the Act, e.g. to promote industry, to establish codes of fair competition, or to remove obstructions to interstate commerce. Furthermore, the Act did not contain any clear standards on which price fixing was to be based. (*) From the debates in Congress and Section 4 (b) of the Act relating to licenses, it appeared that destructive price cutting, which term was intended to include selling below cost, was intended to be prohibited and declared an unfair method of competition under the codes.(*) This might seem to have been a standard by which to prescribe minimum prices, but the difficulty was that there had been no previous judicial construction of the term "destructive price cutting" and there was no explanation of its meaning in the Act. A reasonable definition of the term would be the act of selling at such prices as threaten ruin or destruction of an industry to the detriment of the public interest. If so defined the prohibition of sales below appropriately determined minima, within the scope of Federal power undoubtedly would have

(*) cf. Railway Retirement v Alton Railway Co. (1935) 295 U.S. 330 (Commerce Power) and Highland v Russell Car Company, 279 U.S. 253 (War Power). This subject will doubtless receive further elaboration when the Supreme Court passes on the Bituminous Coal Conservation Act.

(**) See Hegerman Farms Corporation v Baldwin (1934) 293 U.S. 163 Borden's Farm Products Co. Inc. v Baldwin (1934) 293 U.S. 194, and Borden's Farm Products Co. v. Ten Eyck, U. S. Sup. Ct. October Term #597 Argued January 6, 1936.

(***) Accordingly some courts refused to enforce the price fixing provisions in codes. U.S. v. Sutherland, 9 Fed. 204; Mississippi Valley Hardwood Company v. McLanahan, 8 Fed. Sup 318; cf. Wilentz v. Crown Laundry Service Co. 116 N.J. Eq. 40, 172 Atl. 331. But see contra, U.S. v Spotless Dry Cleaners 6 Fed. Sup. 725; Spielman Motor Sales Company v Dodge, 8 Fed. Sup. 437, cf. Stokes v. Newton Creek Coal and Coke Co. 153 Misc. 332; 275 N. Y. Sup. 296

(***) Congressional Record, 73rd Congress, First Session, 5373.

been sustained under the doctrine of the Nebbia Case. The fixing of "emergency" prices was factually and legally supportable under this construction. On the other hand, "price floors" or "reasonable prices", if higher than necessary to prevent destructive price cutting, would seem to have been of doubtful validity under the terms of the act.(*)

(*) See cases in which the courts refused to enforce price fixing provisions in codes cited in note, supra, and see also Note 34 Columbia Law Review 1518.

C. MINIMUM PRICE PROVISIONS UNDER NRA CODES AND PRICE CUTTING.

Most of the minimum price provisions in N.R.A. codes if embodied in agreements by competitors controlling a particular market would have been illegal under the Sherman Act, in view of the Trenton Potteries case and the limited area to which the principle of the Appalachian Coals case has been extended by the Supreme Court. They were subject to many practical and legal objections. First, the standards on which the devices were based were vague - "costs", "representative costs", "lowest reasonable costs", "reasonable prices"- difficult to determine accurately and subject to differences of opinion. Second, so many complex factors and interests are involved or affected whenever prices are arbitrarily set, that it would be impossible to form even reasonably accurate conclusions as to whether the public interests were adequately protected. Third, to give a private group power to set prices exposes the public to too great a danger of misuse of the power and of extortionate prices which would be hard to detect.

The evils which the minimum price provisions of codes were intended to correct - price cutting and selling below cost - are not considered unfair methods of competition by the courts at the present time unless accompanied by discrimination or by an intent to injure a competitor or to obtain monopoly control. (*) However, it is not beyond the realm of possibility that the courts may some day hold that price cutting which is "destructive" (threatens ruin or disruption of an industry to the detriment of the public interest) is an unfair method of competition. (**)

(*) F. T. C. v. Sears Roebuck (1919) 258 Fed. 307
Ward Baking Co. v. F. T. C. (1920) 264 Fed. 230
American Steel Co. v. American Steel & Wire Co. 244 Fed 200
Kresge v. Champion Spark Plug Co. (1935) 3 F (2d) 415
U.S.V. Great Western Sugar Co. (1929) 39 Fed. (2d) 149
cf. Fairmount Creamery Co. v. Minnesota (1930) 274 U.S.1.
cf. U. S. v Sutherland (1934) 9 Fed. Supp. 204

(**) cf. F. T. C. v Keppel, (1934) 291 U. S. 304, 10, 14.

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OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Materials Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Construction Industry and NRA Construction Codes, the
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
  Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
  Part B - Section 3 (e) of NIRA and its administration.
  Part C - Imports and Importing under NRA Codes.
  Part D - Exports and Exporting under NRA Codes.
Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Income, A study of,
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Statistical Background of NRA
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The
9675.

Women's Apparel Industry, Some Aspects of the

Trade Practice Studies

Commodities, Information Concerning: A Study of NRA and Related Experiences in Control
Distribution, Manufacturers' Control of: A Study of Trade Practice Provisions in Selected NRA Codes
Design Piracy: The Problem and Its Treatment Under NRA Codes
Electrical Mfg. Industry: Price Filing Study
Fertilizer Industry: Price Filing Study
Geographical Price Relations Under Codes of Fair Competition, Control of
Minimum Price Regulation Under Codes of Fair Competition
Multiple Basing Point System in the Lime Industry: Operation of the
Price Control in the Coffee Industry
Price Filing Under NRA Codes
Production Control Under NRA Codes, Some Aspects of,
Resale Price Maintenance Legislation in the United States
Retail Price Cutting, Restriction of, with special Emphasis on The Drug Industry.
Trade Practice Rules of The Federal Trade Commission (1914-1936): A classification for comparison with Trade Practice Provisions of NRA Codes.

Labor Studies

Employment, Payrolls, Hours, and Wages in 115 Selected Code Industries 1933-1935
Hours and Wages in American Industry
Labor Program Under the National Industrial Recovery Act, The
  Part A. Introduction
  Part B. Control of Hours and Reemployment
  Part C. Control of Wages
  Part D. Control of Other Conditions of Employment
  Part E. Section 7(a) of the Recovery Act
PRA Census of Employment, June, October,1933
Puerto Rico Needlework, Homeworkers Survey

Administrative Studies

Administrative and Legal Aspects of Stays, Exemptions and Exceptions, Code Amendments, Conditional Orders of Approval
Administrative Interpretations of NRA Codes
Administrative Law and Procedure under the NIRA
Agreements Under Sections 4(a) and 7(b) of the NIRA
Approved Codes in Industry Groups, Classification of
Basic Code, the -- (Administrative Order X-61)
Code Authorities and Their Part in the Administration of the NIRA
  Part A. Introduction
  Part B. Nature, Composition and Organization of Code Authorities
  Part C. Activities of the Code Authorities
  Part D. Code Authority Finances
  Part C. Summary and Evaluation
9675.

Code Compliance Activities of the NRA
Code Making Program of the NRA in the Territories, The
Code Provisions and Related Subjects, Policy Statements Concerning
Content of NIRA Administrative Legislation
  Part A. Executive and Administrative Orders
  Part B. Labor Provisions in the Codes
  Part C. Trade Practice Provisions in the Codes
  Part D. Administrative Provisions in the Codes
  Part E. Agreements under Sections 4(a) and 7(b)
  Part F. A Type Case: The Cotton Textile Code
Labels Under NRA, A Study of
Model Code and Model Provisions for Codes, Development of
National Recovery Administration, The: A Review and Evaluation of its Organization and Activities
NRA Insignia
President's Reemployment Agreement, The
President's Reemployment Agreement, Substitutions in Connection with the
Prison Labor Problem under NRA and the Prison Compact, The
Problems of Administration in the Overlapping of Code Definitions of Industries and Trades, Multiple Code Coverage, Classifying Individual Members of Industries and Trades
Relationship of NRA to Government Contracts and Contracts Involving the Use of Government Funds
Relationship of NRA with other Federal Agencies
Relationship of NRA with States and Muncipalities
Sheltered Workshops Under NRA
Uncodified Industries: A Study of Factors Limiting the Code Making Program

Legal Studies

Anti-Trust Laws and Unfair Competition
Collective Bargaining Agreements, the Right of Individual Employees to Enforce Provisions of
ommerce Clause, Possible Federal Regulation of the Employer-Employee Relationship Under the
Delegation of Power, Certain Phases of the Principle of, with Reference to Federal Industrial Regulatory Legislation
Enforcement, Extra-Judicial Methods of
Federal Regulation through the Joint Employment of the Power of Taxation and the Spending Power
Government Contract Provisions as a Means of Establishing Proper Econ mic Standards, Legal Memorandum on Possibility of
Intrastate Activities Which so Affect Interstate Commerce as to Bring them Under the Commerce Clause, Cases on
Legislative Possibilities of the State Constitutions
Post Office and Post Road Power -- Can it be Used as a Means of Federal Industrial Regulation?
State Recovery Legislation in Aid of Federal Recovery Legislation History and Analysis
Tariff Rates to Secure Proper Standards of Wages and Hours, the Possibility of Variation in
rade Practices and the Anti-Trust Laws
Treaty Making Power of the United States
War Power, Can it be Used as a Means of Federal Regulation of Child Labor?
9675.

THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of these studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. Industry and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
General Contractors Industry
Graphic Arts Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:

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Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
9675.

Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry